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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 839

JAMES MAXFIELD AND HUGH WILTON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 840

HUGH WILTON AND JAMES MAXFIELD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1035–1046) is reported at 152 F. 2d 593.

JURISDICTION

The judgments sought to be reviewed were entered December 14, 1945. (R. 1047–1048.) Peti-

tion for rehearing was denied on January 12, 1946. (R. 1049.) Petition for writs of certiorari was filed February 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Code, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the entire profits realized by petitioners under a contract which required twenty-seven months to fulfill may be charged to petitioners in the year of completion (1937), where the compensation had been paid in advance, but where they failed to report the income in any year.

2. Whether the court below properly refused to disturb the convictions under the fourth counts of each of the two indictments herein (it being contended that both counts were based on the same conspiracy), where the sentences of imprisonment with respect to those counts were concurrent with each other as well as with the sentences under the first three counts of the indictments, and where fines were imposed with respect to only one of the indictments.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Section 145 (b) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical with Section 145 (b) of the Revenue Act of 1934.

* * * * *

Criminal Code:

SEC. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (18 U. S. C. 88.)

STATEMENT

This case involves two separate indictments, each in four counts, charging petitioners with wilfully attempting to evade payment of a substantial part of their individual income taxes for the calendar years 1935, 1936 and 1937, in violation of Section 145 (b), Revenue Act of 1934, and Revenue Act of 1936, and with conspiring to evade payment of a substantial part of their individual income taxes for the calendar years 1933 to 1937, inclusive, in violation of Section 37 of the Criminal Code. Indictment No. 10455 (R. 2–28) deals with the taxes of James Maxfield. The first three counts charge attempts on the part of petitioners Maxfield and Wilton to defeat and evade a large part of taxes due from Maxfield for 1935, 1936 and 1937, and the fourth count charges the two with conspiring to defeat and evade Maxfield's taxes for the years 1933 to 1936, inclusive. Indictment No. 10456 (R. 28–55) charges the same two petitioners in the first three counts with attempting to evade and defeat Wilton's taxes for the calendar years 1935, 1936 and 1937, and in the fourth count with conspiring to evade Wilton's taxes for the years 1933 to 1937, inclusive. The cases were consolidated for trial, and after verdicts of guilty by the jury on all counts of both indictments as to both petitioners, each petitioner was sentenced to serve one year in the county jail on each of the four counts of

each indictment, such sentences to run concurrently, and each petitioner was fined $5,000 on each of the four counts of Indictment No. 10455. (R. 65–79.)

In 1932 petitioners contracted with certain Nevada miners to form the Chiquita Mining Company, Limited, a Nevada corporation. The agreement provided that certain mining claims would be transferred to the corporation in consideration of the issuance to the miners of 250,000 shares of a total capitalization of 1,000,000 shares. The 250,000 shares issued to the miners, together with 250,000 additional shares issued to James Maxfield and Hugh Wilton as a bonus for organizing the corporation, were placed in escrow with an option to Maxfield and Wilton to purchase for $87,500 the stock issued to the miners and the further option to purchase the remaining 500,000 shares of treasury stock at a price of fifteen cents per share. The miners were paid the agreed sum for their stock, and ultimately it, together with the bonus stock and treasury stock, was transferred at the request of petitioners to the Chiquita Mine Syndicate, hereinafter referred to as the Syndicate. (R. 289–291.)

During the years 1933 to 1936, inclusive, petitioners sold 265,040 shares of the stock to the public for $768,242.58 in cash and for property having a fair market value at the time of acquisition of $114,960.25, or total proceeds of $883,-

202.83. The cost of shares sold was $47,883.03, leaving gross profit on the transactions of $835,-319.80. (R. 474–478, Ex. 53.) These stock sales, as well as other business carried on by Maxfield and Wilton during the years 1933 to 1937, inclusive, to which reference will subsequently be made, were conducted under the name of the Syndicate and the profits divided equally between the two petitioners. (R. 344.) A fictitious firm name certificate recorded in Clark County, Nevada, in 1932 purported to show James Maxfield to be the sole owner of the Syndicate. (R. 343.) However, Wilton claimed a one-half interest in the profits and stated to the revenue agent that Maxfield was shown as sole owner "for certain legal reasons." (R. 344.) The Syndicate filed a partnership return for the calendar year 1933 showing the Syndicate to be a joint venture of Maxfield and Wilton. (Ex. 1, R. 303–315.) No partnership returns were filed for the subsequent years.

By letter of May 20, 1940, addressed to the revenue agent and signed by Maxfield and Wilton, the details of a transaction between the Syndicate and a Dr. Colver and his wife relative to a mining property known as the Herman Mine are set forth. (R. 458–470, Ex. 47.) In 1935 the Syndicate entered into agreements with Dr. Colver and his wife whereby the latter delivered 1,500 shares of the capital stock of Kellogg Company in

exchange for 1,000 shares of stock of the Chiquita Mining Company, Limited, and 9,000 shares of stock in a company known as Maxfield-Wilton & Associates, Inc., to which had been transferred title to the mine. (R. 458–459.) One of the conditions of the agreement was that the Herman Mine should be unwatered and the ore bodies opened up to the satisfaction of the Colvers. (R. 458.) During 1935 and 1936 the Syndicate disposed of the Kellogg stock for $250,395.15. (R. 461.) Work was commenced on the mine in April, 1935, and was completed in July, 1937, at which time the Colvers formally accepted the work in satisfaction of the contract. (R. 469–470.) To complete this work Maxfield and Wilton expended in 1935, 1936 and 1937 a total of $152,760.68. The Chiquita Mining Company, Limited, stock delivered to the Colvers cost the Syndicate $175, leaving Maxfield and Wilton a taxable profit on the transaction of $97,459.47. (R. 461.) The revenue agent assigned the entire amount of this profit as income received in the calendar year 1937. (R. 471.)

In 1936 Maxfield and Wilton accepted real property and securities from members of the public in return for agreements to make monthly payments to the transferors of such property. (R. 443.) This property had a fair market value at the time of its transfer of $93,855.19. According to the written admissions of the peti-

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tioners, the monthly amounts totaling $797.17 to be paid transferors were based on the speculative value of the property received and not on the life expectancy of the grantor. (R. 443–450, Exs. 41, 42, 43, 44.) The revenue agent charged the admitted fair market value to income in the year the property was received, but allowed as ordinary expense of doing business the monthly payments. (R. 594–600.)

In addition to the income referred to above, Maxfield and Wilton also received rent from real property, profit on the sale of securities and real property, interest, and income from several minor sources. (R. 352, 402, 440, 454, 472, Exs. 26, 36, 40, 46, 52.)

The only books and records maintained by the Syndicate consisted of a cash journal in which bank deposits and withdrawals were recorded. The entries made in this journal were under the direction of Wilton. (R. 298–299.) During the course of the investigation the only records made available to the revenue agent by petitioners were the cash journal, canceled checks, memoranda from brokerage houses, stock purchase agreements, and bank statements. (R. 342.) No record was produced as to the sale of stock of the Chiquita Mining Company, Limited, to the public. (R. 343.) There was nothing in the records of Maxfield or Wilton to indicate that they owned a single piece of real estate. (R. 551.)

The evidence showed that in 1933, realizing they were engaged in a profitable enterprise, petitioners approached an accountant on the subject of keeping books for them (R. 264) and inquired whether income taxes could be "reduced" by eliminating certain transactions from the proposed books (R. 266). In the same year Maxfield advised one Martin, a publicity man, that he intended to keep two sets of records, one to show the actual operation of the business and the other for "exhibitions purposes." (R. 275–276.) Wilton subsequently told Martin that he was afraid to hire the accountant "to fix up some books for us" because "this kind of year the income tax might cost us a million dollars." (R. 277.)

A comparison of the net incomes reported by Maxfield and Wilton with those found by the revenue agent from his examination of such records as were produced by them, from conversations with and written admissions obtained from them, and from outside sources, follows (R. 352–353, 402–403, 440–441, 454–455, 472–473, Exs. 26, 36, 40, 46, 52):

James Maxfield

Year	Maxfield reported	Revenue agent's testimony	Difference
1933	$23,445.67	$44,074.62	$20,628.95
1934	10,517.00	32,244.46	21,727.46
1935	9,505.45	55,926.89	46,421.44
1936	3,150.90	33,800.00	30,649.10
1937		47,111.98	47,111.98

Hugh Wilton

Year	Wilton reported	Revenue agent's testimony	Difference
1933	$23,445.66	$44,074.63	$20,628.97
1934	9,842.58	31,839.53	21,996.95
1935	9,062.89	55,484.33	46,421.44
1936	3,762.00	33,800.00	30,038.00
1937		47,111.99	47,111.99

For the calendar years 1934, 1935 and 1936 Maxfield and Wilton and their wives reported on a community property basis, so that understatement of income occurred in the wives' returns for such years in similar amounts to those in their husbands' returns. (R. 142–151, 164–175, 185–193, 203–212, 222–230, 240–248, Exs. 5, 7, 9, 11, 13, 15.) Thus, during the five-year period, of a total net income of $669,998.57 derived from the operation of the Syndicate, a total of only $140,638.36 was reported for income tax purposes.

ARGUMENT

1. Petitioners attack the Circuit Court of Appeals' affirmance of conviction on the third counts of each indictment on the ground that the revenue agent improperly charged the $97,459.47 profit on the Colver transaction as being income to them in the calendar year 1937. (Pet. 17–19.) They apparently argue, first, that the contract should have been reported on the basis of percentage of completion, and, second, that no profit accrued to petitioners by reason of advances made to the Chiquita Mining Company, Limited.

The applicable Treasury Regulations provide that a taxpayer receiving income from long-term contracts may choose to report such income either on the basis of percentage of completion or in the taxable year in which the contract is finally completed. G. C. M. 22682, 1941–1 Cum. Bull. 307; Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 42–4; Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 42–4. However, these petitioners did not report the income by either method. Examination of their returns for 1935 (R. 176–212, Exs. 8, 9, 10, 11) and 1936 (R. 213–248, Exs. 12, 13, 14, 15) and of the tentative returns for 1937 (Exs. 48, 49, 50, 51) discloses their complete failure to adopt either method of reporting the profit from the Colver contract. Under the circumstances, the revenue agent was thoroughly justified in treating the transaction as a long-term contract.

Petitioners assert (Pet. 19) that in any event no profit was received by them from the Colver contract, as the $97,459.47 was part of a total of some $134,000 advanced to the Chiquita Mining Company, Limited, pursuant to oral agreements to advance sufficient money to put the Chiquita Mine on production. They further contend that these advances should be treated and allowed as expenses of doing business. The evidence, how-

ever, plainly shows that this money was loaned to the Chiquita Mining Company, Limited. An agreement entered into by the company and Maxfield (R. 729–743, Ex. F) expressly states that Maxfield did "advance" this money to the company, that Maxfield shall be entitled to receive "repayment" out of the proceeds of the company's profits in excess of specified amounts, that if the company should discontinue business Maxfield shall have the right to operate its property until he had been reimbursed, and that Maxfield shall have a priority on the proceeds of the sale of any of the company's property. The company president testified that at all times it was agreed that the moneys advanced by Maxfield "were to be repaid to him * * *." (R. 745.) Maxfield admitted to the revenue agent that the $134,000 represented a loan which was to be repaid. (R. 518.) The money was treated on the Chiquita Mining Company, Limited, books as a loan. (R. 522.)

Petitioners claim that subsequent to their filing "tentative" returns for 1937 they prepared final returns, but were advised by the revenue agent "as a friend" not to file their final returns. (R. 946.) The revenue agent, however, first interviewed the petitioners on March 9, 1939 (R. 338), and did not commence his investigation until October 11, 1939 (R. 341), approximately twelve and nineteen months, respectively, after the re-

turns were due. Wilton testified that the purported conversation took place after the revenue agent had had some conversation with the bookkeeper, Miss Taylor, about preparing returns. (R. 946–947.) Miss Taylor did not meet the revenue agent until October, 1939. (R. 299.) The crimes charged in the third counts of the indictment are alleged to have occurred "on, to wit, March 15, 1938," the last day upon which proper returns should have been filed. (R. 11, 38.) The filing of returns after the commencement of the investigation would in no way mitigate their offenses.

2. Petitioners contend that the decision of the Circuit Court of Appeals in affirming the convictions on the fourth counts of the indictments (consiracy counts) is in conflict with decisions of this Court and with decisions of the Circuit Court of Appeals for the Seventh Circuit in that but one conspiracy is charged in the two counts, and that unequal penalties were inflicted by the trial court.

The Circuit Court of Appeals after conceding that there was but one conspiracy shown, whereas petitioners were found guilty of two conspiracies, nevertheless affirmed both convictions on the ground that, since the sentences of imprisonment on each conspiracy count run concurrently with those imposed on the remaining counts and the $5,000 fine was imposed for violation of but one of the fourth counts, the penalties were within the

maximum prescribed for a single conspiracy. (R. 1039.) Petitioners contend that this holding is in conflict with the decisions of this Court in *Braverman* v. *United States,* 317 U. S. 49, and *Hirabayashi* v. *United States,* 320 U. S. 81. (Pet. 20.)

In the *Braverman* case this Court held that an indictment containing seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States, in fact constituted but one conspiracy. The *Hirabayashi* case held that where a defendant has been convicted on two counts of an indictment and the sentences are ordered to run concurrently, it is unnecessary on review to consider the validity of the sentences on both counts if the sentence on one of them is sustainable. Neither case is in conflict with the decision of the Circuit Court of Appeals in the instant case. On the other hand, the Circuit Court of Appeals' decision is in conformity with the rule announced by this Court in *United States* v. *Trenton Potteries,* 273 U. S. 392, 401–402, as follows:

> The first count being sufficient and the case having been properly submitted to the jury, we may disregard certain like objections relating to the second count. The jury returned a verdict of guilty generally on both counts. Sentence was imposed in part on the first count and in part on both counts, to run concurrently. The

> combined sentence on both counts does not exceed that which could have been imposed on one alone. There is nothing in the record to suggest that the verdict of guilty on the first count was in any way induced by the introduction of evidence upon the second. In these circumstances the judgment must be sustained if either one of the two counts is sufficient to support it. *Claassen* v. *United States,* 142 U. S. 140; *Locke* v. *United States,* 7 Cranch 339, 344; *Clifton* v. *United States,* 4 How. 242, 250.

The cases of *United States* v. *Anderson,* 101 F. 2d 325 (C. C. A. 7th), certiorari denied, 307 U. S. 625, *Miller* v. *United States,* 4 F. 2d 228 (C. C. A. 7th), certiorari denied, 268 U. S. 692, and *Murphy* v. *United States,* 285 Fed. 801 (C. C. A. 7th), cited by petitioners are not in conflict with *Hirabayashi* v. *United States, supra,* or *United States* v. *Trenton Potteries, supra.* In each of the cases relied on by the petitioners the defendants had been sentenced to penalties in excess of the maximum prescribed by the conspiracy statute. In the *Hirabayashi* and *Trenton Potteries* cases, upon which the Government relies, the sentences under the plural counts were less than the maximum prescribed for a single offense.

3. Petitioners allege (Pet. 27) that the decision below is in conflict with the rule prescribed in *Maryland Casualty Co.* v. *Jones,* 279 U. S. 792,

in that the court failed to dispose of all petitioners' assignments of error. However, the Circuit Court of Appeals, after discussing in detail what it apparently considered to be the important issues of the case, specifically stated that it had considered all of the points advanced by the petitioners but was of the opinion that no reversible error was committed either in rulings on evidence or in respect of instructions. (R. 1046.)

Petitioners urge (Pet. 29–30) that if any conspiracy existed it was abandoned prior to June 14, 1935, and more than six years prior to the filing of the indictments. But, as pointed out in the Statement, *supra,* p. 9, the petitioners in 1933 planned to evade their taxes, as disclosed by their conversations with the accountant and Martin. That they did not utilize the method of keeping two sets of records does not indicate an abandonment of the conspiracy itself. On the other hand, from the time of such conversations and thereafter at all periods of time set forth in the indictment, they followed a course of maintaining inadequate records and of preparing and filing false and fraudulent income tax returns, which acts took place within the statute of limitations, as did the other overt acts enumerated in the conspiracy counts.

4. Petitioners assert that the 1936 transactions whereby they received real property, trust deeds and bonds having a fair market value of $93,-

855.91, in exchange for promises to pay stipulated monthly amounts to the grantors during their respective lives, should have been treated as the purchase of property rather than the receipt of income. (Pet. 11–12, 35.) According to the petitioners, the agreements to pay the stipulated monthly amounts were not based upon the fair market value of the properties when received nor upon the life expectancy of the grantor. The payments were based upon the speculative values of the properties, and the petitioners admitted realizing taxable income based upon the fair market value of the properties at the time of receipt. (R. 443–450, Exs. 41, 42, 43, 44.) After receipt of these assets Maxfield in December, 1936, conveyed real property and trust deeds having a fair market value of $84,817.50 received from these transactions to a corporation known as Residential Income Properties, Inc., in return for the right to receive all of its $150,000 authorized capital stock. This right he subsequently assigned to another corporation. (R. 450–452, Ex. 45.) In computing taxable income for the calendar year 1936 the revenue agent included $91,600 ($93,855.-91 less allowance of $2,255.91) from this source. (R. 452, 454–455, Ex. 46.) Monthly payments to the grantors were treated as deductible expense in the year when actually made. (R. 648.) The revenue agent included the amount of $91,600 as income apparently for the same reason that gain

was recognized upon receipt of the property exchanged for Chiquita stock as discussed herein. See pp. 5–6, *supra*. In any event, should the entire sum of $91,600 be eliminated from taxable income received by petitioners for the calendar year 1936, there would still have remained a substantial under-statement of income, warranting their conviction for that year. Petitioners and their wives reported total income divided among the four for the year 1936 of but $13,734.90. (R. 213–248, Exs. 12, 13, 14 ,15; R. 454.) The revenue agent testified that during the year 1936 petitioners received net income of $135,199.99. (R. 452–453.) If petitioners' contentions were allowed and the sum of $91,600 were eliminated, the total net income of petitioners would have been the sum of $29,945.09, or considerably more than twice the amount reported by them and their wives. It is not incumbent upon the prosecution to prove the full amount of income alleged by the indictment to have been unreported. *United States* v. *Johnson*, 319 U. S. 503, 517; *Tinkoff* v. *United States*, 86 F. 2d 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689.

Finally, petitioners contend that the failure to report the additional income charged in the indictment was the result of a mere disagreement between the taxpayers and the Government. This was a matter for the jury to determine on the question of the wilfulness and intent of petition-

ers' failure to report all of their income for purposes of taxes and was determined by the jury adversely to the petitioners.

CONCLUSION

The decision below is correct and no conflict in decisions is presented. It is respectfully submitted that the petition for writ of certiorari should be denied.

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END OF A CASE